**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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| **STATE OF OKLAHOMA,** | : | |
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| **Plaintiff,** | : | |
| | : | |
| **v.** | : | **Case No. 4:05-CV-329-GKF-PJC** |
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| **TYSON FOODS, INC., *et al.*,** | : | |
| | : | |
| **Defendants.** | : | |

**STATE OF OKLAHOMA'S RESPONSE TO DEFENDANTS' MOTION TO STRIKE "NEW AND UNDISCLOSED" EXPERT OPINIONS [DKT NO. 2241]**

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## I. INTRODUCTION

The State of Oklahoma ("State"), hereby submits its response in opposition to Defendants' motion to strike numerous exhibits to the above-referenced docket entries (Dkt. #2241) ("Motion").[1] Defendants contend that these exhibits — which are declarations and affidavits prepared by five of the State's consulting experts and five of its testifying experts (collectively, "Declarations") — constitute "untimely and undisclosed expert opinions" in violation of Federal Rules of Civil Procedure 26(a) and (e). They therefore urge the Court to strike them pursuant to Rule 37(c). (*See* Motion at 1, 6-7.) Specifically, Defendants accuse the State of enlisting "attack experts" (*id.* at 9-10) to launch "a surprise attack" on their experts (*id.* at 11). They paint the Declarations as impermissible supplemental and rebuttal reports, claim prejudice, and express their purported concern for maintaining the current trial date.[2] (*See, e.g.*, Motion at 7, 11, 12, 14, 15, 18, 21, 24).

Defendants' allegations are as ironic as they are spurious. Having served their expert reports anywhere from three months to a year after the State, Defendants' experts are almost all "attack experts," their expert reports are almost exclusively "rebuttal reports," and it is the State that would be prejudiced and denied due process if the Court were to strike the Declarations.[3]

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[1] On page 6 of their Motion, Defendants specify 22 documents. On pages 24-25, however, they intimate that those documents are not exhaustive.

[2] Defendants' argument that they "wish to avoid" delaying the trial (Motion at 12) is belied by their June 30, 2009 motion for an order continuing the trial date. (Dkt. #2296.)

[3] This is especially true given that Defendants have engaged in the very practice that they falsely ascribe to the State. Specifically, Defendants have submitted declarations from seven of their experts, namely, Drs. Cowan (Dkt. #2163, Ex. 7), Johnson (Dkt. #2169, Ex. 2), Clay (Dkt. #2197, Ex. F), Davis (Dkt. #2186, Ex. G), McGuire (Dkt. #2167, Ex. C), Murphy (Dkt. #2190, Ex. E), and Sullivan (Dkt. #2160, Ex. 6). Among other things, Dr. Cowan's declaration provides several new charts (Dkt. #2163, Ex. 7, at 2-11), Dr. Johnson's includes a new graph and the previously undisclosed opinion that partitioning between dissolved and particulate affects the variability of total phosphorus (Dkt. #2169, Ex. 2, at 2, 14), and Dr. Murphy asserts for the first

Rather than offer an alternative theory or explanation concerning the cause of phosphorous and bacteria pollution in the IRW or the rational for natural resource injury, Defendants' expert opinions serve almost exclusively as a critique of the State's experts.

As discussed below, Rule 26 does not apply to evidence offered solely for the purpose of *Daubert* and, in the present case, the information contained in the Declarations is essential to the Court's analysis in this context. *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Specifically, the State has offered all but two of the Declarations in response to Defendants' attacks, both in support of and opposition to motions to exclude expert witnesses. Because these Declarations are not offered for use at trial[4] — but rather as evidence relevant to the reliability of the experts' opinions — they are permissible, and the Motion should be denied.[5]

## II. LEGAL STANDARD

### A. Declarations Submitted in Context of *Daubert* Challenges

The issue with respect to the Declarations submitted in support of or in opposition to motions to exclude expert witnesses is whether they will assist with the Court's assessment of the reliability of the experts' opinions. Specifically, in this *Daubert* context, the well-reasoned view is that neither Rule 26 nor Rules of Evidence 702, 703, or 705 apply to declarations or

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time his view that principle components cannot represent sources at all because they are too mathematically complex to represent something in the real world (Dkt. #2190, Ex. E, at 4).

[4] The State is submitting the Declarations for the limited purpose of providing the Court with a sufficient record to consider the *Daubert* motions at hand. *See, e.g.*, *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1228 (10th Cir. 2003) ("gatekeeper obligation . . . can be satisfied only if the court has sufficient evidence to perform the task" (internal quotation marks omitted)). The State reserves its right, however, to offer "true rebuttal" pursuant to the Court's January 29, 2009 Order (Dkt. #1842).

[5] In addition, the State has offered one Declaration in support of its Motion for Partial Summary Judgment (Dkt. #2062) and one in opposition to Defendants' Motion for Summary Judgment (Dkt. #2125). Because they constitute admissible evidence under Federal Rule of Civil Procedure 56(e), the Court should not strike them.

testimony offered concerning the reliability of testifying expert opinions.[6] *See* Fed. R. Evid. 104(a); *see also City of Owensboro v. Kentucky Utilities Co.*, No. 4:04-cv-87, 2008 U.S. Dist. LEXIS 79292, at *4 (W.D. Ky. Oct. 8, 2008) (even if "[e]xpert testimony . . . does not comply with [Rule 26]," it is "only excluded at trial and may be properly considered on a *Daubert* determination" (internal quotation marks omitted)); *Reed v. Smith & Nephew, Inc.*, 527 F. Supp. 2d 1336, 1347 (W.D. Okla. 2007) ("the Court may consider inadmissible materials in regards to a *Daubert* motion"); *350 W.A. LLC v. Chubb Group of Ins.*, No. 05-cv-75, 2007 U.S. Dist. LEXIS 89881, at *83 (S.D. Cal. Dec. 5, 2007) (denying motion to strike undisclosed expert's declaration on ground that "trial courts may exercise discretion in determining how to evaluate the relevance and reliability of expert opinion testimony"); *UAW v. GM*, 235 F.R.D. 383, 388 (E.D. Mich. 2006) (overruling objection to expert declarations offered in fairness hearing on ground that "Rule 26 is a *trial*-oriented discovery rule" (emphasis in original)).

In *Owensboro*, for example, the plaintiffs' *Daubert* motion included an affidavit averring that the defendant's expert had "violated accepted statistical procedures and methodology." 2008 U.S. Dist. LEXIS 79292, at *3. As here, the defendant moved to strike the affidavit on the ground that, "pursuant to Fed. R. Civ. P. 26(a)(2)(B) and the Court's scheduling orders, the time for presenting expert opinions and rebuttal expert opinions ha[d] expired." *Id.* The court concluded that the affidavit "may properly be considered . . . in assessing [the plaintiff's] *Daubert* motion." *Id.* at *4 (citing *Florists' Mut. Ins. Co. v. Lewis Taylor Farms, Inc.*, No. 7:05-cv-50, 2008 U.S. Dist. LEXIS 24445, at *53 n.12 (M.D. Ga. Mar. 27, 2008)).

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[6] Rule 26 governs the disclosure of "any witness [a party] may use *at trial* to present evidence under Federal Rule of Evidence 702, 703, or 705." Fed. R. Civ. P. 26(a)(2)(A) (emphasis added); *see also* Fed. R. Civ. P. 26(e) (addressing supplementations of disclosures made "under Rule 26(a)"); Fed. R. Civ. P. 37(c) (imposing sanctions for failure to comply with Rule 26(a) or (e)).

Likewise, in *Lyman v. St. Jude Medical S.C., Inc.*, 580 F. Supp. 2d 719 (E.D. Wis. 2008), in considering whether to exclude the plaintiffs' expert, the court entertained the declaration of an undisclosed consulting expert offered by the plaintiffs to demonstrate that the regression model employed by the challenged expert was statistically significant. *Id.* at 725. The court overruled the defendant's objection to the undisclosed expert's declaration, noting that his "testimony only became relevant in response to [the defendant's] *Daubert* challenge, so there was no requirement of prior disclosure. The use of supplemental evidence to defeat [the defendant's] *Daubert* challenge is proper and the Court will not strike the Declaration." *Id.* at 725 n.3. The rationale for this view is that Rule 26:

> . . . does not require that a report recite each minute fact or piece of scientific information that might be elicited on direct examination to establish the admissibility of the expert opinion under *Daubert*. Nor does it require the expert to anticipate every criticism and articulate every nano-detail that might be involved in defending the opinion on cross examination at a *Daubert* hearing. . . . Failure to include the required information frustrates the purpose of candid and cost-efficient expert discovery — but so would a requirement of *too much* information.

*McCoy v. Whirlpool Corp.*, 214 F.R.D. 646, 652 (D. Kan. 2003) (emphasis in original).

Accordingly, "an expert need not stand mute in response to an opposing party's *Daubert* motion," *Allgood v. GM*, No. 1:02-cv-1077, 2006 U.S. Dist. LEXIS 70764, at *15 (S.D. Ind. Sept. 18, 2006), and, as set forth below, the State properly has offered the Declarations to help the Court to assess the reliability of the experts' opinions. *See Owensboro*, 2008 U.S. Dist. LEXIS 79292, at *3; *350 W.A. LLC*, 2007 U.S. Dist. LEXIS 89881, at *82-*85.

**B. Declarations Submitted in Context of Summary Judgment**

The issue with respect to the admissibility of summary judgment Declarations is whether they reflect the experts' underlying Rule 26 reports. In contrast to the *Daubert* context, an

affidavit or declaration supporting or opposing summary judgment must contain admissible evidence. Fed. R. Civ. P. 56(e). Accordingly, Defendants are correct that Rule 26 does apply to the State's two summary judgment Declarations. *See Bryant v. Farmers Ins. Exchange*, 432 F.3d 1114, 1122 (10th Cir. 2005) ("A summary judgment affidavit may not contain expert testimony unless the affiant has first been designated an expert witness under Fed. R. Civ. P. 26(a)(2).")

That said, the issue here is not "whether to admit supplemental expert opinions" under Rule 26(e) (Motion at 3), but rather whether the experts' summary judgment Declarations actually constitute supplemental opinions (i.e., opinions *not* set out in their Rule 26 reports). They do not. Specifically, the two Declarations submitted by the State in the context of summary judgment do not "differ in any material respect" from their Rule 26 reports. *Reed*, 527 F. Supp. 2d at 1350. Accordingly, they are admissible under Rule 56(e), and the Court should not strike them. *See, e.g.*, *Freeman v. United States*, No. CIV-07-452, 2008 U.S. Dist. LEXIS 43360, at *5 (W.D. Okla. June 2, 2008) (denying motion to strike expert affidavit submitted with response to motion for summary judgment because expert's opinions were "implicit in . . . Rule 26 expert report"); *see also* Fed. R. Evid. 1006 (permitting use of summary of admissible evidence).

## III. ARGUMENT

Contrary to Defendants' aspersion that the State is attempting to circumvent Rule 26 and the Court's orders regarding expert reports by offering supplemental and/or rebuttal expert reports "through the proverbial backdoor" (*see* Motion at 5), the State has not offered the Declarations "to strengthen or deepen opinions expressed in the original expert report[s]." (*See id.* at 2 (internal quotation marks omitted).)

Instead, the State properly has submitted all but two of the Declarations attendant to *Daubert* briefing, which briefing is intended to help the Court assess the reliability and admissibility of the opinions of the State's and Defendants' experts. Indeed, given that the almost exclusive purpose of Defendants' experts was to critique the State's, it would be fundamentally unfair to deprive the State of the opportunity to provide the Court with pertinent, countervailing evidence of the reliability of its experts (and the concomitant unreliability of Defendants'). *See Dodge*, 328 F.3d at 1228 ("gatekeeper obligation . . . can be satisfied only if the court has sufficient evidence to perform the task" (internal quotation marks omitted)); *see also McCoy*, 214 F.R.D. at 652 (finding "no legal authority for proposition that expert disclosures — standing alone — must meet and exceed all possible lines of attack under *Daubert*").

Such countervailing evidence does *not* constitute rebuttal or supplemental disclosures. (*See* Motion at 3.) To the contrary, the evidence is offered to protect the experts' *original*, previously-disclosed opinions by defending against attacks regarding their reliability (i.e., admissibility under Rule 702), a preliminary issue for the Court. *See Lyman*, 580 F. Supp. 2d at 725 n.3; Fed. R. Evid. 104(a). A supplemental or rebuttal report, on the other hand, offers new opinions and is intended for use at trial. *See Palmer v. Asarco Inc.*, No. 03-cv-059, 2007 U.S. Dist. LEXIS 56969, at *13, *18, *23 (N.D. Okla. Aug. 3, 2007). Thus, the present case is distinguishable from those relied upon by Defendants.[7] (*See* Motion at 4-5.)

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[7] In *Palmer*, for example, the expert's affidavit contained entire topics that "were not addressed in his original report, rebuttal report, or [previous] affidavit," U.S. Dist. LEXIS 56969, at *11, and its "new opinions, facts, and testing" were intended for use at trial, *see, e.g.*, *id.* at *18 (noting "short time frame to prepare *for trial* and the difficulty in obtaining *rebuttal* expert testimony" (emphases added)). Indeed, the plaintiffs in *Palmer* expressly argued that the affidavits were "intended to supplement their Rule 26(a)(2) disclosures." *Id.* at *14. Likewise, *Quarles v. United States*, No. 00-CV-0913, 2006 U.S. Dist. LEXIS 96392 (N.D. Okla. Dec. 5,

In addition, the State offers two Declarations in the context of summary judgment briefing. Because they "harmlessly repeat information provided in the earlier reports," *Allgood*, 2006 U.S. Dist. LEXIS 70764, at *15, and do not "differ in any material respect" from their Rule 26 reports, *Reed*, 527 F. Supp. 2d at 1350, these Declarations constitute admissible expert testimony for purposes of summary judgment. *See, e.g.*, *Freeman*, 2008 U.S. Dist. LEXIS 43360, at *5; Fed. R. Evid. 1006.

The experts and Declarations are addressed in turn.

**A. The State Properly Submitted Dr. Rick Chappell's Declarations to Help the Court to Assess the Reliability and Admissibility of Drs. Cowan and Olsen.**

Defendants move to strike Dr. Chappell's Declarations submitted (1) in support of the State's *Daubert* motion to exclude Charles Cowan's expert opinion (Dkt. #2072-6) and (2) in opposition to Defendants' motion to exclude a portion of Roger Olsen's expert opinion (Dkt. #2198-4, Ex. E). (Motion at 7-10.) Dr. Chappell is a non-testifying (i.e., consulting) expert.[8] As an independent contractor and former employee of the State's consultant, Camp, Dresser & McKee ("CDM"), he assisted Dr. Olsen with his principal component analysis ("PCA"). (Dkt. #2198-4, Ex. E, ¶ 4.)

Defendants enlisted Dr. Cowan to support their *Daubert* challenge to Dr. Olsen's PCA opinion. The State has submitted Dr. Chappell's Declarations to provide the Court with evidence

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2006), and *Akeva v. Mizuno*, 212 F.R.D. 306 (M.D.N.C. 2002), involved new reports reflecting the results of new tests. *See* 2006 U.S. Dist. LEXIS 96392, at *15; 212 F.R.D. at 310.

[8] This accounts for why "Defendants have not been provided with any . . . disclosures" (Motion at 7). *See* Fed. R. Civ. P. 26(b)(4)(B). It should be noted, moreover, that the State has agreed to provide Defendants with materials considered in preparing the Declarations. (*See* Motion at 7.) Defendants were aware of the role of the State's consulting experts, deposed some, and were not denied the opportunity to depose others. Indeed, Dr. Chappell's role in assisting Dr. Olsen in this case was disclosed to Defendants during Dr. Olsen's deposition. (Exhibit A, Olsen Depo., 09-11-08, at 301:3-5.) Defendants knew of and could have deposed Dr. Chappell but chose not to do so.

that Dr. Cowan — not Dr. Olsen —fails to satisfy the *Daubert*/Rule 702 standard. Specifically, Dr. Chappell explains that he has worked extensively with statistical analysis of environmental data of the type employed by the State and used by Dr. Olsen in his PCA analysis. (*Id.*, ¶¶ 1-4.) Dr. Chappell also explains that Dr. Olsen's PCA analysis is reliable because it is consistent with multiple lines of evidence and fate and transport analysis (*id.*, ¶ 6), and that the PCA offered by Dr. Olsen is based on well-established scientific methods (*id.*, ¶¶ 7-10, 12-21). In contrast, Dr. Chappell concludes that Dr. Cowan's criticisms are illogical and not based on an understanding of environmental data. (*Id.*, ¶¶ 11-21.)

With regard to Dr. Chappell's Declaration in support of the State's *Daubert* motion to exclude Dr. Cowan's expert opinions, Defendants rely upon *Reed*, 527 F. Supp. at 1348, in support of their contention that Dr. Chappell is an impermissible "attack witness" or "attack expert." (Motion at 9-10.) In *Reed*, however, the court's decision to strike an expert affidavit was based on the premise that the opposing party was "justified in its expectation that [the expert's] identity," as an individual likely to have *discoverable* information, "would have been disclosed under Fed. R. Civ. P. 26(a)." 527 F. Supp. 2d at 1348. As previously discussed, Rule 26(b)(4)(B) expressly dispenses with any such expectation in the present case. *See supra* note 8.

Moreover, the case cited in *Reed*, 527 F. Supp. 2d at 1347, for the "attack expert" language — namely, *Celebrity Cruises, Inc. v. Essef Corp.*, 434 F. Supp. 2d 169 (S.D.N.Y. 2006) — actually supports the State's position in this case. As here, in support of its *Daubert* motion in *Celebrity*, the plaintiff submitted two declarations authored by an expert who was not disclosed as a trial witness. *Id.* at 190. The court did not use the phrase "attack expert" in any pejorative sense but summed up the expert's role by saying: "In short, [he] is, as [the defendant] characterizes him, an 'attack expert.'" *Id.* Nonetheless, the court rejected the notion that the so-

called attack expert's evidence "should itself be subject to a determination of admissibility. . . ." *Id.* Instead, the court concluded that it "need only consider" whether the declarations were "sufficiently reliable to be persuasive in [the court's] evaluation of the expert reports that it criticize[d]." *Id.* Accordingly, the *Celebrity* court considered the expert's declarations in deciding the plaintiff's *Daubert* motion. *See id.* at 193. That is what this Court should do here.

With regard to Dr. Chappell's Declaration in opposition to Defendants' motion to exclude Dr. Olsen, Defendants argue that Dr. Chappell "essentially design[ed] Dr. Olsen's PCA work" and "exercised independent judgment" and that, therefore, the Court should regard his Declarations as "a new expert report." (Motion at 9.) Specifically, Defendants rely upon *Dura Automotive Systems v. CTS Corp.*, 285 F.3d 609 (7th Cir. 2002), in which the court concluded that the trial judge "was reasonable in regarding the affidavits as experts' reports . . . rather than merely as attestations that show that [the challenged expert] was competent to report the results of the modeling exercises undertaken by other employees of the consulting firm." *Id.* at 612.

The issue in *Dura* was not whether the affiant was "timely disclosed as an expert" under Rule 26 — as Defendants contend here — but rather whether his work was "'of a type reasonably relied upon'" by the testifying expert. *See In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 646, 653 (N.D. Ill. 2006) (quoting Fed. R. Evid. 703). Specifically, in *Dura*, the plaintiff's testifying expert, a hydrogeologist, had relied upon mathematical models of groundwater flow prepared by other, non-testifying employees of his consulting firm. 285 F.3d at 611-12. In opposition to the defendant's motion to exclude the expert, the plaintiff supplied affidavits from those employees. *Id.* at 612. The court concluded that those affidavits contained evidence that would have to be presented *at trial* but about which the hydrogeologist was *not* qualified to testify. *See id.* at 612, 614-15.

In the present case, in contrast, Dr. Olsen is eminently qualified to testify regarding Dr. Chappell's work as his assistant for the PCA. This is not a case where Dr. Chappell "exercise[d] professional judgment that is beyond [Dr. Olsen's] ken." *See id.* at 613. Indeed, Dr. Olsen *directed* Dr. Chappell's work and did the same work as well. (*E.g.*, Exhibit A, Olsen Depo., 09-11-08, at 301:3-5, 16-25.)

Moreover, even if the Court were to draw an analogy between this case and *Dura*, it should reject Defendants' invitation to reach the extreme result lambasted in that case's dissent. Specifically, Judge Diane P. Wood rejected the majority's apparent view "that every party who wishes to proffer expert testimony has an obligation under the discovery rules to name as an expert everyone whose expertise in any way affects the opinion of another expert." *Id.* at 622 (Wood, J., dissenting). Instead, this Court should embrace Judge Wood's conclusion that a party "who wishes to argue that the underlying expert's opinion is contestable" should do so "*during the* Daubert/*Rule 702 hearing*." *Id.* (emphasis added). Likewise, a party supporting a contested methodology may introduce expert testimony in the context of *Daubert* "since hearsay is admissible at a *Daubert* hearing and the rules of evidence do not apply." *Id.* at 618; *see also Reed*, 527 F. Supp. 2d at 1347 ("the Court may consider inadmissible materials in regards to a *Daubert* motion").

Here, Dr. Chappell's Declarations address both of these scenarios, supporting Dr. Olsen's PCA work and, in turn, contesting Dr. Cowan's opinions attacking that work. Simply stated, they provide the Court with evidence necessary to perform its gatekeeper function. They do not implicate or violate Rule 26. And the Court should not strike them.

**B. The State Properly Submitted Dr. Jim Loftis' Declarations to Help the Court to Assess the Reliability and Admissibility of Drs. Davis, Johnson, Murphy, Cowan, Harwood and Olsen.**

Defendants move to strike Dr. Loftis' Declarations submitted in support of the State's motions to exclude (1) Andy Davis (Dkt. #2064-5), (2) Glenn Johnson (Dkt. #2083-4), (3) Brian Murphy (Dkt. #2074-4), and (4) Charles Cowan (Dkt. #2072-5); and in opposition to Defendants' motions to exclude (5) Valerie Harwood (Dkt. #2116-6) and (6) Roger Olsen (Dkt. #2198-4, Ex. D). (Motion at 10-13.) Dr. Loftis is a non-testifying (i.e., consulting) expert.[9] He is an environmental scientist and engineer with specialized expertise in the area of environmental statistics, who supported Drs. Harwood and Olsen, among others, by double-checking and analyzing statistical issues. (*See* Dkt. #s 2116-6, 2198-4; *see also* Exhibit A, Olsen Depo., 09-11-08, at 574-575.) Defendants enlisted Drs. Johnson, Murphy, and Cowan to rebut Dr. Olsen's and Dr. Harwood's work. The State has submitted Dr. Loftis' Declarations to provide the Court with evidence that Drs. Johnson, Murphy, and Cowan fail to satisfy the *Daubert*/Rule 702 standard, not Drs. Olsen and Harwood. (*See* Dkt. #s 2072-5, 2074-4, 2083-4.) The State also has submitted a Declaration from Dr. Loftis to support its *Daubert* motion concerning Defendants' expert, Andy Davis. (Dkt. #2064-5.)

Like Dr. Chappell, Defendants contend that the State has used Dr. Loftis "to launch a surprise attack," and they frame his Declarations in defense of their *Daubert* motions against Drs. Harwood and Olsen and in support of the State's *Daubert* motions concerning the opinions of Drs. Johnson, Murphy, Davis and Cowan as "supplemental reports" subject to Rule 26(e). (Motion at 11.) However, as previously discussed, because Dr. Loftis' Declarations are *not* offered for use at trial, Rule 26 does not apply. *See supra* section II.A. Instead, the State

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[9] *See supra* note 8.

properly has submitted Dr. Loftis' Declarations to help the Court to assess the reliability and admissibility of the opinions of Drs. Davis, Johnson, Murphy, Cowan, Harwood, and Olsen. *See, e.g.*, *Owensboro*, 2008 U.S. Dist. LEXIS 79292, at *4; *Celebrity*, 434 F. Supp. 2d at 190, 193.

Defendants' reliance on *Palmer* is unavailing.[10] (*See* Motion at 10-11.) Defendants cite to that case for the proposition that "an *undisclosed* witness may not submit an untimely affidavit to bolster expert opinions or to support *Daubert* motions seeking to exclude such opinions through 'attack' opinions." (*Id.* at 11 (emphasis added) (citing 2007 U.S. Dist. LEXIS 56969, at *16-*18).) In *Palmer*, however, the plaintiffs offered an affidavit authored by their *testifying* expert in opposition to the defendants' motion to exclude that expert. 2007 U.S. Dist. LEXIS 56969, at *9. The affidavit "contain[ed] new opinions, facts, and testing that were not previously disclosed." *Id.* at *13. Accordingly, the court found it to be "a new expert report with new opinions," *id.*, a fact that the plaintiffs did not dispute, *id.* at *10. Moreover, it appears that the plaintiffs in *Palmer* intended to use the new affidavit *at trial*. *See id.* at *9-*18.

These concerns are not implicated here. Dr. Loftis is a consulting, *non-testifying* expert, whose Declarations have been offered solely in the context of *Daubert* briefing. Defendants have suffered no prejudice or surprise, *see supra* note 8, and Dr. Loftis' Declarations constitute neither supplemental nor rebuttal reports. Instead, they properly address the reliability of Drs. Harwood's and Olsen's expert opinions and comment on the critique leveled by Defendants'

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[10] Likewise, Defendants also rely on a number of other cases for the unassailable proposition that courts may strike untimely reports or improper attempts to "buttress" an initial report. These cases do not, however, address the propriety of expert declarations in the context of *Daubert* briefing. *See, e.g.*, *Akeva*, 212 F.R.D. at 307, 312 (excluding report from use at *trial*); *Cohlmia v. Ardent Health Servs., LLC*, 254 F.R.D. 426, 434 (N.D. Okla. 2008) (same); *Hudgins v. Vermeer Mfg. Co.*, 240 F.R.D. 682, 686 (E.D. Okla. 2007) (same); *Quarles*, 2006 U.S. Dist. LEXIS 96392, at *17-*18 (same); *Leathers v. Pfizer, Inc.*, 233 F.R.D. 687, 698-99 (N.D. Ga. 2006) (excluding declaration of treating physician on ground that he was being offered as retained expert and was required to file report).

witnesses, Drs. Davis, Johnson, Murphy, and Cowan, in order to enhance the Court's understanding of the various reports and expert opinions already at issue. *See, e.g.*, *350 W.A. LLC*, 2007 U.S. Dist. LEXIS 89881, at *82-*85; *see also Miller v. Pfizer, Inc.*, 356 F.3d 1326, 1332 (10th Cir. 2004) ("an expert's initial Rule 26 report cannot always anticipate every possible challenge"). Accordingly, the Court should not strike them.

### C. The State Properly Submitted Dr. Michael Sadowsky's Declaration to Help the Court to Assess the Reliability and Admissibility of Dr. Harwood.

Defendants move to strike Dr. Sadowsky's Declaration submitted in opposition to their motion to exclude Valerie Harwood (Dkt. #s 2116-1, 2116-2). (Motion at 13-14.) Dr. Sadowsky is a non-testifying (i.e., consulting) expert.[11] He is a distinguished microbiology professor at the University of Minnesota, who peer reviewed Dr. Harwood's microbial source tracking work. Specifically, Dr. Sadowsky performed a blind test of the polymerase chain reaction ("PCR") methodology of identifying a poultry specific bacterial DNA biomarker. (*See generally* Dkt. #s 2116-1, 2116-2, 2116-3 (Declaration and CV).)

One of the nonexclusive factors that a trial court may consider in assessing the reliability of expert testimony is whether the expert's opinion has been subjected to peer review. *E.g.*, *Dodge*, 328 F.3d at 1222 (citing *Daubert*, 509 U.S. at 594). Expert declarations and/or affidavits are appropriate to establish that an expert's work has been peer reviewed, as acknowledged even by the majority in *Dura*. *See Dura*, 285 F.3d at 612. Accordingly, the Court may consider Dr. Sadowsky's Declaration for this purpose.[12]

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[11] *See supra* note 8.

[12] Although peer reviews are often published, "publication . . . is not essential for admissibility or synonymous with reliability." *United States v. Bonds*, 12 F.3d 540, 559 (6th Cir. 1993). "While scientific journals may be the most prevalent forum for the dissemination of scientific claims, they are clearly not the sole forum for true peer review." Effie J. Chan, Note,

Defendants' argument that they will suffer incurable prejudice if they are not given an opportunity to test Dr. Sadowsky's work is a red herring. (*See* Motion at 14.) What matters is that Defendants have had an opportunity to test Dr. Harwood's PCR methodology (and they claim to have done so). Moreover, Defendants were aware of the testing being performed by Dr. Sadowsky because Dr. Harwood was asked about Dr. Sadowsky's testing and peer review at her deposition (Exhibit B, Harwood Depo., 07-18-2008, at 31-36) and Defendants were provided with a copy of Dr. Sadowsky's test report (*see* Dkt. #s 2116-1, 2116-2). Again, Defendants could have deposed Dr. Sadowsky but declined to do so. And they cite no authority for the proposition that a Court should disrupt the trial schedule or preparations to afford a party the opportunity to test a peer reviewer's work. (*See* Motion at 14.)

**D. The State Properly Submitted Declarations of Drs. Tamzen Macbeth and Jennifer Weidhaas to Help the Court to Assess the Reliability and Admissibility of Dr. Harwood's PCR Opinion.**

Defendants move to strike the Declarations of Drs. Macbeth (Dkt. #2116-4) and Weidhaas (Dkt. # 2116-5) submitted in opposition to Defendants' motion to exclude Valerie Harwood. (Motion at 14-16.) Drs. Macbeth and Weidhaas are non-testifying (i.e., consulting) experts.[13] They are Ph.D. environmental engineers who, at all relevant times, worked for North Wind Inc., the laboratory retained to perform various tests directed by Dr. Harwood that were part of Dr. Harwood's PCR biomarker work. (Dkt. #s 2116-4, ¶¶ 3-4; 2116-5, ¶ 3.)

Similar to their claim regarding Dr. Chappell, Defendants contend that Drs. Macbeth and Weidhaas "actually completed the 'biomarker' work referenced in Dr. Harwood's expert report"

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*The "Brave New World" of* Daubert*: True Peer Review, Editorial Peer Review, and Scientific Validity*, 70 N.Y.U. L. Rev. 100, 130 (1995). "At its most basic level, true peer review takes place whenever one scientist tests the results of another scientist." *Id.* That is what Dr. Sadowsky did here.

[13] *See supra* note 8.

and that, under *Dura*, they "are not permitted to appear now for the first time at the *Daubert* stage to save the testifying expert." (Motion at 15.) As previously discussed, the issue in *Dura* was whether the non-testifying expert's work was of a type reasonably relied upon by the testifying expert.[14] *See supra* section III.A (citing 285 F.3d at 611-12). The decision to strike the affidavits in that case was based on the court's conclusion that they contained evidence that would have to be presented *at trial* but about which the testifying expert was *not qualified* to testify. *See* 285 F.3d at 612, 614-15.

In the present case, in contrast, Drs. Macbeth and Weidhaas did not exercise professional judgment that was "beyond the [Dr. Harwood's] ken." *See id.* at 613. Instead, they worked under the supervision of and executed tests directed by Dr. Harwood. Indeed, Dr. Harwood is a nationally recognized scholar in the area of PCR in particular and microbial source tracking methods in general. She is widely published concerning the PCR methods employed by Drs. Macbeth and Weidhaas at her direction. Dr. Harwood could have done the same work in her own laboratory at the University of South Florida, but chose not to because of other academic and research commitments.[15] (Dkt. #2115-4, ¶¶ 2, 20-37, 45.) Accordingly, the Court should not strike Drs. Macbeth's and Weidhaas' Declarations.

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[14] As also discussed *supra*, this Court should adopt the reasoning of Judge Wood in her dissent in *Dura* that the proponent of the assisting expert's work should be permitted to introduce supporting evidence in the context of the *Daubert* challenge itself. *See* 285 F.3d at 618 (Wood, J., dissenting).

[15] Additionally, Defendants received copies of all of the documents that they requested from North Wind Labs concerning Dr. Harwood's work, and they requested that the State produce Dr. Macbeth for deposition in Tulsa, which it did. Incredibly, while they object to Dr. Macbeth's *Daubert* Declaration, and even though the State does not seek to produce Dr. Macbeth for testimony at trial, Defendants have designated portions of her deposition for trial.

### E. The State Properly Submitted Darren Brown's Affidavit to Help the Court to Assess the Reliability and Admissibility of Mr. Churchill's Opinions on Sampling.

Defendants move to strike Mr. Brown's Declaration submitted in support of the State's motion to exclude Jay Churchill's opinions concerning some of the environmental samples collected by the State (Dkt. #2058-7). (Motion at 16-18.) Mr. Brown is a testifying expert. Specifically, the State will offer his testimony concerning the sampling protocols, methods and means conducted by the State in this Case. Mr. Brown is a CDM employee who was primarily responsible for IRW sampling. Defendants enlisted Mr. Churchill to offer an opinion and critique concerning the sampling performed. The State has submitted Mr. Brown's Affidavit to provide the Court with evidence that it is Mr. Churchill, not Mr. Brown, who fails satisfy the *Daubert*/Rule 702 standard.

Courts routinely consider affidavits and declarations of testifying experts in determining their work's reliability and admissibility. *See, e.g.*, *Miller*, 356 F.3d at 1333 (providing court-appointed experts with testifying expert's declarations filed in response to *Daubert* challenge); *Goebel v. Denver & Rio Grande Western R.R. Co.*, 346 F.3d 987, 994 (10th Cir. 2003) (noting court's "careful review" of expert's affidavits). Although an affidavit that "states additional opinions or rationales or seeks to 'strengthen' or 'deepen' opinions expressed in the original expert report exceeds the bounds of permissible supplementation," *Palmer*, 2007 U.S. Dist. LEXIS 56969, at *15 (internal quotation marks omitted), "an expert need not stand mute in response to an opposing party's *Daubert* motion," *Allgood*, 2006 U.S. Dist. LEXIS 70764, at *15. There is no requirement that expert disclosures "cover any and every objection or criticism of which an opposing party might conceivably complain." *Id.*

Whereas in *Palmer*, the affidavit included entire topics that had not been addressed in the expert's original report, 2007 U.S. Dist. LEXIS 56969, at *11, in the present case, Mr. Brown's Affidavit "either respond[s] to [Mr. Churchill's] specific *Daubert* criticism or harmlessly repeat[s] information provided in [his] earlier report[]." *Allgood*, 2006 U.S. Dist. LEXIS 70764, at *15. Specifically, Mr. Brown's Affidavit, which was attached in support of the State's *Daubert* motion, was actually signed and dated February 29, 2008 and was prepared in response to Mr. Churchill's testimony during the preliminary injunction ("PI") hearing. The Affidavit was never filed with the Court but was contained as part of the production of Mr. Brown's considered materials that accompanied his expert report filed several months following the PI hearing. Thus, Defendants' assertion that the "affidavit" now "attempts to rectify the problems" with and "bolster" Mr. Brown's expert report and deposition (Motion at 17) are flatly untrue.

Mr. Brown's Declaration "do[es] not amount to the sort of prohibited ambush by an expert," *Allgood*, 2006 U.S. Dist. LEXIS 70764, at *15, and the Court should not strike it.

**F. The State Properly Submitted Dr. Roger Olsen's Declarations to Help the Court to Assess the Reliability and Admissibility of Drs. Davis and Johnson, and to Summarize and Apply Dr. Olsen's Expert Report to the State's Motion for Partial Summary Judgment.**

Defendants move to strike Dr. Olsen's Declarations submitted in support of the State's (1) *Daubert* motion to exclude defense expert Andy Davis' opinion (Dkt. #2064-4); (2) *Daubert* motion to exclude defense expert Glenn Johnson's opinion (Dkt. #2083-5), and (3) motion for partial summary judgment (Dkt. #2103-10). (Motion at 18-21.) Dr. Olsen is a testifying expert. He is a senior vice president and senior geochemist with CDM, who, among other things, performed PCA as one of several lines of evidence identifying poultry waste contamination in the IRW.

Defendants enlisted Drs. Davis and Johnson to rebut Dr. Olsen's and other of the State's experts' opinion. The State has submitted Dr. Olsen's Declarations to provide the Court with evidence that their critiques fail to satisfy the *Daubert*/Rule 702 standard. Specifically, Dr. Olsen's Declarations address issues that were raised for the first time in Drs. Davis' and Johnson's reports, including concerns regarding dry weight measures and whether the scientific literature supports Dr. Olsen's PCA work and opinion. For example, Dr. Olsen shows by reference to Table 18 of his expert report that Dr. Davis' calculations of IRW sediment phosphorous concentrations are incorrect because he failed to convert the sediment samples to dry weight values for comparison. (Dkt. 2064-4, ¶¶ 4-5.) Dr. Olsen submitted his Declaration in support of the State's *Daubert* motion challenging portions of Defendants' expert, Dr. Johnson's, opinion. Dr. Olsen points out that Dr. Johnson is not qualified to offer an opinion on his PCA analysis because he is unfamiliar with the sources of phosphorous in IRW waters and he is not familiar with the IRW sampling data or physical and geochemical processes that control phosphorous water quality. (*See id.*, ¶¶ 5-23.)

These are appropriate topics for a declaration submitted for consideration in the context of a *Daubert* challenge, *see Owensboro*, 2008 U.S. Dist. LEXIS 79292, at *4, which do not impermissibly "supplement" or "bolster" Dr. Olsen's opinions contained in his original report, *see Miller*, 356 F.3d at 1332. Instead, they demonstrate the unreliability of Drs. Davis' and Johnson's opinions.

Defendants' reliance on *Dixie Steel Erectors, Inc. v. Grove U.S., L.L.C.*, No. CIV-04-390, 2005 WL 3558663 (W.D. Okla. Dec. 29, 2005), is misplaced. (*See* Motion at 19.) In that case, the plaintiff's expert's report was "styled as his '*Preliminary* Report of Findings,'" *id.* at *2 (emphasis in original), which was appropriate given that the expert did not complete his "most

meaningful and informative work" until after he had the defendant's original and supplemental expert reports in hand, *id.* at *4. Undoubtedly, the plaintiff also intended to offer the expert's new opinions *at trial*. *See id.* at *9 ("preliminary report" was a "mere place holder, submitted with the effect . . . of putting plaintiff and [plaintiff's expert] in a position to await defendant's reports before deciding what they really needed to do *to make their case*" (emphasis added)). Because the work was so fundamental and significant, there simply was no excuse for the expert to have failed to perform the work and provide his report in a timely fashion. *Id.* at *8. The court recognized, however, that "there will be cases in which post-report activity by an expert will not be as objectionable. . . ." *Id.* at *8 (citing *Miller*, 356 F.3d at 1332).

This is that case. In contrast to the facts in *Dixie Steel*, Dr. Olsen's *Daubert* Declarations do not contain new opinions that the State needs "to make [its] case." *See id.* at *9. Whereas the *Dixie Steel* expert's "additional work hardly amount[ed] to a fine tuning of data previously disclosed," *id.* at *7 (internal quotation marks omitted), Dr. Olsen's Declarations answer discrete, behind-the-scenes attacks by Defendants' experts and are offered solely for the Court's benefit in its determination of the reliability and admissibility of Drs. Davis' and Johnson's expert opinions. *See Owensboro*, 2008 U.S. Dist. LEXIS 79292, at *3; *Miller*, 356 F.3d at 1332.

Likewise, Dr. Olsen's Declaration offered in support of the State's motion for summary judgment does not convey new information, correct errors, or add supporting data. (Motion at 18-19.) Instead, in his Declaration (Dkt. #2103-10), Dr. Olsen properly describes the analyses and opinions already disclosed in his expert report and summarizes the pertinent portions applicable to the State's motion for summary judgment. *See, e.g.*, *Freeman*, 2008 U.S. Dist. LEXIS 43360, at *5 (denying motion to strike expert affidavit submitted with response to motion for summary judgment because expert's opinions were "implicit in . . . Rule 26 expert report").

Accordingly, the Court should not strike Dr. Olsen's Declarations.

**G. The State Properly Submitted Dr. Christopher Teaf's Declaration to Help the Court to Assess the Reliability and Admissibility of Drs. Teaf's and Sullivan's Opinions and to Apply Dr. Teaf's Expert Opinion to the State's Opposition to Defendants' Motion for Summary Judgment.**

Defendants move to strike Dr. Teaf's Declarations submitted: (1) in opposition to Defendants' *Daubert* motion to exclude some of his expert opinions (Dkt. #2156-2); (2) in support of the State's *Daubert* motion to exclude some of defense expert Timothy Sullivan's opinions (Dkt. #2071-4); and (3) his affidavit submitted in opposition to Defendants' motion for summary judgment as to the Resource Conservation and Recovery Act ("RCRA") (Dkt. #2130-3, Ex. 82). (Motion at 21-23 & n.10.) Dr. Teaf is a testifying expert. He is a environmental risk assessor and toxicologist who calculated bacterial exceedances in the IRW recreational waters, evaluated the risk of bacterial contamination in the IRW waters, and assessed the risk of disinfection by-products in drinking water obtained from the IRW.

Defendants enlisted Dr. Sullivan to rebut some of Dr. Teaf's work and opinions, and the State has submitted Dr. Teaf's Declarations to provide the Court with evidence that it is Dr. Sullivan, not Dr. Teaf, who fails to satisfy the *Daubert*/Rule 702 standard. Specifically, Dr. Teaf explained that Dr. Sullivan incorrectly calculated the geometric mean of bacterial levels in surface waters, which invalidates his opinion concerning contamination of surface waters by bacteria. (*See* Dkt. #2071-4, ¶¶ 9-10.) Because Dr. Teaf's Declarations respond to Defendants' specific *Daubert* criticisms and do not contain new opinions that the State needs "to make [its] case," *see, e.g.*, *Dixie Steel*, 2005 WL 3558663, at *9, they "do not amount to the sort of prohibited ambush by an expert," *see Allgood*, 2006 U.S. Dist. LEXIS 70764, at *15.

Dr. Teaf also submitted a Declaration defending his expert opinion from Defendants' *Daubert* challenge concerning his expert report. In this Declaration, Dr. Teaf responds to and

addresses the points raised by Defendants in their motion. He elaborates on his experience as a risk assessor and refutes the arguments made by Defendants challenging his credentials and risk assessment methods. (*See* Dkt. 2156-2.) Thus, the Declaration is offered solely to protect Dr. Teaf's *original*, previously-disclosed opinion by defending against attacks regarding its reliability. *See McCoy*, 214 F.R.D. at 652 (finding that expert disclosures need not recite all information to establish reliability under *Daubert* nor are they required to anticipate and recite all details that might be involved in defending an opinion against attack). Thus, Dr. Teaf's Declaration is not offered to supplement his report (i.e., trial testimony) but rather to defend that report. This is proper.

Likewise, Dr. Teaf's Affidavit filed in opposition to Defendants' motion for summary judgment does not, as Defendants contend, "assert new opinions related to the survivability of bacteria" and "as to why the Oklahoma State Department of Health has never conducted an outbreak investigation in the IRW." (Motion at 23.) Defendants cite paragraphs 7, 8 and 14 of Dr. Teaf's Affidavit as examples of these claimed new opinions. (*Id.*) Paragraphs 7 and 8, however, recite almost verbatim the opinions offered by Dr. Teaf in paragraph 35 of his expert report. Similarly, paragraph 14 of Dr. Teaf's Affidavit tracks paragraph 40 of his report. The other statements in the Affidavit also are supported by statements in Dr. Teaf's expert report. (*See* Dkt. #2130-3.)

Accordingly, the Court should not strike Dr. Teaf's Declarations or Affidavit.

**H. The State Properly Submitted Dr. Bernard Engel's Declarations to Help the Court to Assess the Reliability and Admissibility of His Expert Report and Opinions on Watershed Modeling.**

Defendants move to strike Dr. Engel's Declaration submitted in response to Defendants' *Daubert* motion to exclude his expert opinion concerning his computer modeling of phosphorous

runoff (Dkt. #2158-1). (Motion at 23-24.) Dr. Engel is department chair and professor of agricultural and biological engineering at Purdue University. He performed computer modeling of phosphorous watershed runoff and its travel to Lake Tenkiller. Defendants enlisted Dr. Bierman to rebut Dr. Engel's work and to support their *Daubert* motion attacking Dr. Engel's watershed computer modeling. The State has submitted Dr. Engel's Declaration to provide the Court with evidence that it is Dr. Bierman, not Dr. Engel, who fails satisfy the *Daubert*/Rule 702 standard. Thus, Dr. Engel supports his opinions based on his computer modeling and demonstrates that Defendants' attacks are speculative and not supported by the relevant scientific community. (*See* Dkt. #2158-1.)

This is appropriate for a declaration submitted in the context of a *Daubert* challenge, *see Owensboro*, 2008 U.S. Dist. LEXIS 79292, at *4, and it does not impermissibly "supplement" or "bolster" his original report, *see Miller*, 356 F.3d at 1332. Contrary to Defendants' claim (Motion at 23-24), Dr. Engel's Declaration simply and thoroughly refutes the criticisms offered by Defendants and is being offered solely to defend against Defendants' *Daubert* challenge. Accordingly, the Court should not strike Dr. Engel's Declaration.

## I. The State Properly Submitted Dr. Berton Fisher's Declaration to Help the Court to Assess the Reliability and Admissibility of Dr. Olsen's PCA Opinion.

Finally, Defendants move to strike Dr. Fisher's Declaration submitted in opposition to Defendants' motion to exclude Dr. Olsen (Dkt. #s 2198-5, 2198-6). (Motion at 24 n.11.) Dr. Fisher is a testifying expert. He is a Ph.D. geochemist and geologist, whose Declaration responds to claims contained in Defendants' *Daubert* attack of Dr. Olsen, including Defendants' claims that Dr. Olsen's PCA fails because it is not supported by a "traditional" fate and transport analysis and that Dr. Olsen's PCA identified poultry waste contamination in locations where

there was no documented poultry waste disposal. Thus, Dr. Fisher disproves Defendants' contention that the PCA is unsupported by other lines of evidence developed by the State (and others) in this case and the claim that Dr. Olsen's PCA is mistaken about poultry contamination in certain areas of the IRW.

Like Dr. Engel's, the analyses and opinions contained in Dr. Fisher's Declaration are consistent with his expert report and have been properly submitted to assist the Court in determining the reliability and admissibility of Dr. Olsen's work. *See Owensboro*, 2008 U.S. Dist. LEXIS 79292, at *3; *Miller*, 356 F.3d at 1332. For example, Dr. Fisher recited his and other experts' opinions and work concerning findings and opinions (other lines of evidence and fate and transport analysis) that support Dr. Olsen's PCA opinion. (*See* Dkt. #s 2198-5, 2198-6, ¶¶ 7-10, 14-16.) Additionally, for the purpose of defending against Defendants' *Daubert* challenge of Dr. Olsen's PCA, Dr. Fisher investigated specific areas identified by Defendants in their *Daubert* motion to determine, contrary to the allegations in their *Daubert* motion, that poultry waste had been disposed of in Defendants' identified areas and thereby confirmed Dr. Olsen's PCA analysis of those areas. (*Id.*, ¶¶ 11-13, 17-20.)

Again, this work and analysis is being offered solely to defend the reliability of Dr. Olsen's PCA opinion in the context of the *Daubert* challenge. *See McCoy*, 214 F.R.D. at 652. Accordingly, the Court should not strike Dr. Fisher's Declaration. Rather, the Court should consider it as evidence assisting it in its *Daubert* evaluation.

## IV. CONCLUSION

As set forth above, the State properly has offered the Declarations to protect its experts' *original*, previously-disclosed opinions by defending against *Daubert* motions challenging their reliability and to synthesize information already provided in the State's experts' reports for

purposes of summary judgment. Accordingly, Defendants' Motion to Strike (Dkt. # 2241) should be denied.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of July, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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